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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

Appeal from the Court of Appeals of Franklin County, Ohio

MINNIE R. DE LAY AND CLIFTON DE LAY,
Petitioners,

vs.

DANIEL W. MANES,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORIARI TO THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 1015

MINNIE R. DELAY AND CLIFTON DELAY,
Petitioners,

vs.

DANIEL W. MANES,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORIARI TO THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO.

STATEMENT OF THE CASE

The property here in question was condemned for high way construction purposes by the Department of High ways, State of Ohio, in appropriation proceedings in the Common Pleas Court of Franklin County, Ohio. The fee of the land was owned by the petitioners. The respondent, Daniel W. Manes, was lessee of this land for a period of ten years with the absolute right to construct buildings and improvements thereon and to remove such structures upon termination of the lease for any reason.

An apportionment of the respective interests in the property was subsequently made by the Common Pleas Court of Franklin County, Ohio. An appeal was taken

therefrom by respondent and a modification of such apportionment was made by the Court of Appeals. The petitioners filed a motion to reconsider and also filed a motion to have the Court of Appeals certify its decision to the Supreme Court of Ohio, as being in conflict with other decisions in Ohio. Both motions were denied. The petitioners then filed their motion to the Supreme Court of Ohio to certify the decision and also filed their appeal as of right with the Supreme Court of Ohio. The motion to certify was denied and the appeal as of right was dismissed for the reason that no debatable constitutional question was involved. This is reported in 171 OS 545. Petitioners' motion to have the Supreme Court of Ohio reconsider its decisions was denied on March 8, 1961.

In June, 1950, petitioners and respondent executed a lease of the property here in question, consisting of three contiguous tracts of land in Columbus, Ohio. Upon the premises at that time were several residential buildings. In accordance with the terms of the lease, these buildings were razed by the respondent preparatory to the erection of structures to be used in his business. The property was not in condition to be used for the respondent's business of operation of a drive-in restaurant. Improvements were made by respondent to prepare the property for such construction.

Respondent constructed two buildings to meet all restaurant food service, food-maintenance and storage requirements. Within these buildings were installed all improved restaurant facilities, counters, backbars, and other restaurant service facilities. In addition to these buildings, the respondent installed other equipment and requirements commonly found in such facilities. These include restaurant stools and booths, stainless steel counters, con-

densory systems, barricade posts, lamp posts, neon signs, steel awnings and walk-in cooler. See decision of Court of Appeals at page 17 as appended to petitioners' brief. (These total costs were stated by the respondent in the testimony as being in the neighborhood of $30,000.)

Every expenditure with respect to the removal of old buildings, renovation of the property, and construction of all the facilities on the premises was paid for by the respondent. *According to the terms of the lease, these newly constructed buildings remained the property of the respondent at all times and at the termination of the lease or anytime prior thereto.*

The respondent clearly had the right to remove, sell or dispose of these buildings. The lease unequivocally states that at all times they remained the respondent's property. The further provision therein makes the respondent responsible for payment of all taxes upon the buildings erected.

The proceedings in the Court of Appeals was a trial de novo pursuant to respondent's appeal on law and fact. In conformance with the rules of the Court of Appeals, respondent introduced the records of the proceedings in the Court of Common Pleas. The record also included the jury award which, in accordance with Section 5519.30, Ohio Revised Code, made separate determinations of structure and land values.

ARGUMENT

A

The Interpretation of the Terms of a Lease and the Determination of the Respective Interests in Leased Property Appropriated for State Highway Construction Purposes do not Provide Grounds for Review on a Writ of Certioriari.

This case involves the interpretation and the application of the terms of a lease. A review of its provisions, combined with the acts and relationships of the parties in their relation to it, as well as the applicable law, reveals the propriety of the decision of the lower court. The property interests in the lease were freely agreed to between the parties and the agreement has been thoroughly examined and reviewed in the Ohio courts. It is respectfully submitted that no basis is presented for a writ of certioriari to issue from this Court.

A hearing de novo was held before the Court of Appeals at which time all testimony of the lower court, including the lease, was introduced into evidence by the respondent. The rules of that Court provide for introduction of additional evidence but none was presented.

The lease in question contained the usual recitals in printed form and provisions assigning absolute ownership of the buildings and improvements were specifically inserted. The lease was prepared by the petitioners and, of course, should be construed strictly against them. *Fire Association of Philadelphia v. Agresta*, 115 O. S., 427; *Bellish v. The C. I. T. Corp.*, 142 O. S., 36. Its pertinent provisions are set forth in the opinion of the Common Pleas Court at pages 30 and 31 of the petitioner's brief.

The jury award assigned $24,500 to structures and the remaining $20,000 to land. In accordance with its interpretation of the lease, the Court of Appeals awarded to the respondent the value assignable to structures. Such a determination is proper. The lease gave the respondent free and complete control of the property with the absolute provision that all buildings remain his property. The bare land only was the property of the petitioners. The petitioners paid only taxes on *land* leased while respondent paid taxes on all *buildings and improvements* subsequently constructed during the terms of the lease.

Respondent had the right to destroy existing buildings, erect and maintain new buildings and remove the buildings he had erected. All new buildings, improvements and their maintenance were made at respondent's sole expense. In other words, the structures and improvements were at all times the property of respondent.

The lease was terminated twenty-six (26) months prior to its expiration. Testimony was presented as to the value of the leasehold interest and there was ample evidence available to the Court of Appeals upon which to make its complete apportionment.

The petitioners have not been deprived of due process under Title 28, Sec. 1257 of the U. S. Code. The evidence amply supports the decision of the lower court. Conflicting choice of evidentiary facts and differing interpretation of instruments and facts are present in any case. The fact that a party's contentions and estimate of his property interest valuations are at variance with a court's determination does not constitute a lack of due process. *Tidal Oil Co., et al v. Flanagan*, 263 U. S., 441, at pg. 450; *Central Land Co. v. Laidley*, 159 U. S., 103; *Willoughby v. City of Chicago*, 235 U. S., 45. Such a determination occurs in all litigation.

This case fails to present a basis for review within the contemplation of the provisions of Rule 19 of the Supreme Court Rules. The arguments advanced have been previously presented to the Ohio Supreme Court. The character of the supporting reasons as advanced by the petitioners cannot be termed special or important and do not present a question of substance not heretofore determined by this Court. In fact, to the contrary, the decision of the Court of Appeals for the 10th Ohio Appellate District is properly founded and determined on the facts in evidence before the Court and is in accord with established law. See cases cited in opinion of Court of Appeals appended at page 16 of petitioners' brief.

B

The Assigned Errors do not Support Petitioners' Contention that the Decision of the Court of Appeals Caused a "Deprivation of the Due Process of Law Under the Constitution of the United States".

(1) *The Leasehold Interest was Properly Assignable to the Respondent and the Valuation Placed Thereon by the Court of Appeals was in all Respects Proper.*

Assignment of Error No. 1 is concerned with the leasehold interest terminated twenty-six (26) months prior to expiration of the lease. By the terms of the lease, respondent had the absolute right to enjoy and have the uninterrupted use of this property during this period. This interest in land encompassed the continued use of this property so as to maintain the respondent's business operations during the entire period of the lease.

Many factors bear upon the leasing of comparable property. Such items as location, accessibility to customers, concentration of traffic, among others, are related to leases. However, the Court of Appeals was concerned with the

factual situation before it, peculiar in its detailed arrangement, where the respondent had suffered a loss of occupancy with a certain indicated valuation having been presented.

The petitioners overlook the leasehold interest in the respondent and the fact that the respondent had the right to retain the property for the full ten (10) years of the lease period and *still remove* the structures. The respondent's interest was cut off before termination of the lease and he was entitled to payment for such loss. In this regard, the Court of Appeals correctly stated in its opinion (at page 25 as appended in petitioner's brief):

> 'What the owners of a lease loses by the appropriation proceeding should not inure to the benefit of the fee. The owner of the leasehold estate should be compensated for what he loses under the lease."

Respondent's interest included his right to remain in the leased premises for the remainder of the term. His rights always encompassed the absolute use of the structures for this period and *also* their value. Condemnation proceedings shortened the respondent's use of these premises with concomitent loss of occupancy, change of location and reinstituting business operations. The recognition of this right and interest by the Court of Appeals is proper.

(2) *The Court of Appeals Correctly Made its Determination of Apportionment Upon all the Evidence Before it.*

The petitioner's contention in Assignment of Error No. 2 fails to recognize that conflicting evidence concerning respective interest values was before the Court of Appeals. The cases cited by the petitioners are not pertinent in view

of the evidence available upon which the Court of Appeals made its determination.

All the evidence presented before the Common Pleas Court was introduced at the trial de novo. The Court disregarded no evidence. Included therein was the determination of land and structure values as made by the jury. (Correct entry of Court of Common Pleas filed June 17, 1959 is attached.) This entry shows land and structure values were set at $20,000 and $24,500 respectively. The appended entry shows very clearly that the Court of Common Pleas had before it the values as set by the jury in the condemnation trial. These values were facts to be considered by the Court of Common Pleas in the subsequent apportionment proceeding. Otherwise, how could an apportionment be made? An appeal on law and fact was taken from the decision of apportionment to the Court of Appeals by the respondent. The proceedings at the apportionment hearing including the jury determinations, in addition to the testimony of witnesses at the appropriation hearing, were included in the record of proceedings in the Common Pleas Court and were introduced into evidence in the Court of Appeals by the respondent. Such determinations thus were clearly before the Court of Appeals for its consideration. *Barnes v. Christy, et al.*, 102 O. S., 160, at pg. 167.

There is no reason to preclude the Court of Appeals from determining that such valuations were proper. They were not binding upon the parties and nowhere does the Court of Appeals state such to be the fact. However, these valuations were entitled to be considered by the Court. The very purpose of the jury's determination was to arrive at valuations. Under Section 5519.03, Ohio Revised Code, the jury was obliged to make separate valuations for land

and structures. No better source could be found for this aspect of the case.

The Court of Appeals properly had this testimony before it. In its opinion, the Court recognized the compliance with its rules. See Page 17 of opinion of Court of Appeals as appended to petitioners' brief. A determination based on several conflicting positions could be made and the determination as set by the jury constituted property valuations which could properly be used in making an apportionment. In *Baltimore & Ohio Railroad Co. v. United States, et al.*, 298 U. S., 349, cited by petitioners, a complete hearing and presentation of evidence were in question. In the instant case, both parties were accorded the right to present evidence. The petitioners chose not to present further or additional evidence after all the proceedings in the trial court were already in the record. Inasmuch as the terms of the lease established the respondent's interest in all structures, it is difficult to understand why the valuation set by the jury in the very same structures is improper. This valuation of interest would be appropriate and, in fact, the very best that would be available. Thus, the decision of the Court of Appeals was clearly supported by the evidence before it. The other cases cited by the petitioners are also not pertinent inasmuch as decisions there made are not thus supported.

Petitioner's Assignment of Error No. 3 is essentially a repetition of their contention in Assignment of Error No. 2. The petitioners admit that the same argument applies. In this regard, this Court's attention is invited to the fact that *all* the evidence presented in the trial court was introduced in the Court of Appeals. All the facts available to the jury in making its determination in respect to structures and land values were available in the Court of Appeals.

Furthermore, the evidence was properly presented to the Court of Appeals. That Court in the 4th and 5th paragraphs of its opinion on pages 16 and 17 (as appended to the petitioners' brief) took cognizance of the evidence submitted to it and plainly stated that it was in conformity with the Court's rules.

(3) *The Interpretation and Application of the Terms of the Lease as Made by the Court of Appeals Were in all Respects Proper.*

The petitioners finally question in Assignment of Error No. 4 the interpretation of the lease by the Court of Appeals. That decision was entirely consistent with the terms of the lease in implementing it. This proposition is also clearly not a basis for granting a review in this Court.

The lease reveals that the term "building" or "buildings" is used throughout in connection with the respondent's right to remove existing structures, to erect new structures and improvements and to remove these new structures and improvements. The same language is used in connection with the respondent's obligation to pay taxes. The respondent erected site improvements and structures under the provision authorizing erection of "buildings". The respondent also paid taxes upon site improvements within the meaning of the term "buildings" while the petitioners paid taxes only on the bare land. Testimony of the Deputy Auditor presented by the respondent established such payments.

Contrary to the petitioners' suggestion that the respondent did not produce evidence or contend in support of the Court's interpretation, it need only be pointed out that respondent's evidence showed that the parties construed the term "building" or "buildings" as including all im-

provements on the land. Otherwise, it would have to be concluded that the term "building" or "buildings" should be given a broad construction when the respondent was installing improvements or paying taxes, but a very narrow construction when removing the improvements. The term could not have two different meanings in the same lease. The Court of Appeals recognizes this proposition when it concludes at page 19 (as appended to petitioners' brief) that the parties by their acts and conduct "have interpreted the word 'buildings' as used in the lease to include site improvements".

In the light of such interpretations and applications by the parties, it is respectfully submitted that the petitioners have not been deprived of due process.

CONCLUSION

In view of the arguments and reasons above advanced, it is respectfully submitted that the petition for the writ of certioriari to the Court of Appeals of Franklin County, Ohio (10th Appellate District) should be denied.

Respectfully submitted,

PAUL TAGUE,
J. PAUL MCNAMARA,
Attorneys for Respondent

APPENDIX

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

In the Matter of the Appropriation by the State of Ohio of an easement for Highway Purposes over the lands of Delay, et al., on State Route 3, Section 13.93, Franklin County, Ohio.

Entry

This cause came on to be heard upon the motion to apportion the award of $44,500.00 heretofore made by the jury in this condemnation proceeding, the claimants being G. Arlowe Bryant, Executor of the Estate of Minnie R. DeLay, deceased, owner, and Daniel W. Manes, lessee. The parties appeared with counsel, testimony was taken and briefs submitted by the respective parties. From the evidence adduced, the Court finds that the jury fixed the value of the land at $20,000.00 and the value of the structures at $24,500.00. The Court finds that the owner-lessor, G. Arlowe Bryant, Executor, is entitled to a total award of $28,982.00, and Daniel W. Manes, lessee, is entitled to a total award of $15,518.00. It is therefore ordered, adjudged and decreed by the Court that G. Arlowe Bryant, Executor of the Estate of Minnie R. Delay, deceased, owner, be and he is hereby awarded $28,982.00, and Daniel W. Manes, lessee, is hereby awarded $15,518.00.

The Court further finds that by agreement of the parties the owner has withdrawn $12,500.00 of the aforesaid sum of $44,500.00, and the lessee has withdrawn $12,500.00, so that there now remains with the Clerk of this Court the sum of $19,500.00, of which sum G. Arlowe Bryant, Executor of the Estate of Minnie R. DeLay, owner, shall receive $16,482.00, and Daniel W. Manes, lessee, shall receive $3,018.00. The Clerk of Courts shall make no distribution of the funds in his possession for five days from the filing

of this entry and in the event either party gives notice of appeal, appeal bond is fixed at $1,000.00. Pending any appeal, no distribution of the funds in the hands of the Clerk of Courts in this action shall be made until such appeal is finally determined.

Reynolds, Judge.